

**Verne, B. Michael**

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**From:** [REDACTED]  
**Sent:** Tuesday, October 11, 2011 6:13 PM  
**To:** Verne, B. Michael  
**Subject:** Rule 802.63, Rule 802.1

Please confirm the conclusions stated below based on the assumed facts stated therein, including in particular that, under Option 1 described below, the acquisition by the Bank is covered by the exemptions in Rules 802.63 of the FTC Premerger Notification Rules ("Rules"), and provide guidance on application of Rule 802.1 to Options 1 and 2.

1. A is a foreign person engaged in equipment leasing and lease financing services in the United States through several controlled U.S. affiliates, including for railcars and other asset classes located in the United States. A has experienced financial difficulty, resulting in liquidation proceedings directed at A in the country in which it is incorporated and based, and foreclosure actions by lenders to U.S. controlled affiliates of A that have made loans secured by railcar assets and perhaps other asset classes held by some, but not necessarily all, of A's U.S. controlled affiliates.
2. B is a foreign bank ("Bank") and several years ago made a loan ("Loan") to A-1, one of A's U.S. controlled affiliates which is a special-purpose entity that holds railcars and related leases on some of the railcars ("Railcar Assets"), and uses same solely to provide leasing and lease financing services to third parties. As security for the Loan, the Bank holds a security interest in the Railcar Assets, which are the only operating assets held by A-1. The Bank made the Loan to A-1 as a creditor in the ordinary course of its business.
3. The Bank provides a wide range of commercial lending and finance services in the United States, but does not presently hold any railcars or related leases on railcars in the United States.
4. The Bank recently commenced an out-of-court foreclosure proceeding on the Railcar Assets due to A-1's default on the Loan. The Bank solicited bids to sell the Railcar Assets in partial or total satisfaction of A-1's debt under the Loan. A third party (C), submitted the highest bid in an amount that will exceed \$66M and may exceed \$263.8M (the current \$50M and \$200M size of transaction thresholds, as adjusted) ("Purchase Price"). The Purchase Price will be substantially less than the current balance due on the Loan. Any applicable size of person tests would be satisfied for the proposed transactions described here.
5. C is a foreign financial services company that engages in equipment leasing and lease financing services in the United States through several controlled U.S. affiliates, including for railcars and other asset classes located in the United States. C will hold the Railcar Assets solely to provide leasing and lease financing services to third parties.
6. The Bank is considering two options to consummate the foreclosure.
  - (i) Option 1: The Bank will credit bid a portion of its current Loan balance at a public or private auction conducted by the Trustee designated in the loan documents. The Bank will purchase the Railcar Assets in partial satisfaction of the Loan. The Bank will subsequently sell the Railcar Assets to C, for which C will pay the Purchase Price to the Bank in cash, net of any expenses and fees that are paid directly to the Trustee for its services in accordance with the Loan documents. The Bank's acquisition of the Railcar Assets at the foreclosure auction and the sale of the Railcar Assets to C will be separate transactions. The Bank will register transfer documents for the Railcar Assets with the U.S. Surface Transportation Board following the foreclosure auction and sale, and C will do so as well following its acquisition of the Railcar Assets from the Bank. The Lender will not engage in any leasing transactions for the Railcar Assets prior to the sale to C.
  - (ii) Option 2: The Bank will direct the Trustee to foreclose on the Railcar Assets and transfer title directly to C as the winning bidder in a private auction conducted by the Trustee in accordance with the Loan documents. C will remit the Purchase Price to the Trustee and the Trustee will remit the Purchase Price to Bank, in partial satisfaction of the Loan, net of expenses and fees of the Trustee in accordance with the Loan documents.

7. To the Bank's knowledge, (i) A has not made any bankruptcy filing in the United States for itself or any U.S. controlled affiliates, nor have such proceedings been commenced by others, but A is subject to a liquidation proceeding in the country in which it is incorporated and based, and (ii) A has not made any other separate public announcement that it intends to exit the business of providing equipment leasing and lease financing services in the United States for railcars and other asset classes. The Bank understands that creditors of some U.S. controlled affiliates of A other than A-1 have engaged in foreclosure proceedings with respect to railcars or other asset classes held by these affiliates, but that A through one or more of its U.S. controlled affiliates continues as of now to provide equipment leasing and lease financing services in the United States for railcars and other assets classes.

8. Under Option 1, the Bank's acquisition of the Railcar Assets is covered by the exemption in Rule 802.63 as an acquisition in foreclosure, or upon default, or in connection with a bona fide debt work-out, made by creditors in a bona fide credit transaction entered into in the ordinary course of the creditors' business.

9. Under Option 1, C's acquisition of the Railcar Assets from the Bank is covered by the exemption in Rule 802.1(d)(1) and (2), as an acquisition of used durable goods that are acquired by C and held solely for the purpose of leasing or resale to an entity not within the acquiring person, and are acquired from the Bank as an acquired person who will acquire and hold the goods solely for resale to an entity not within the acquired person. C's acquisition of the Railcar Assets is not an acquisition of all or substantially all the assets of an operating unit within the terms of Rule 802.1(a), because the Bank will continue to provide a wide variety of commercial lending and finance services in the United States following the transaction.

10. Under Option 2, the exemption in Rule 802.63 does not appear to apply to C's acquisition of the Railcar Assets through the foreclosure proceeding because C is not a creditor in a bona fide credit transaction with respect to the Railcar Assets, but we seek guidance on same. We also seek guidance on whether the transaction under Option 2 would be covered by the ordinary course of business exemption in Section 7A(c)(1) and Rule 802.1. We are aware of recent FTC staff commentary on Rule 802.1 available at <http://www.ftc.gov/bc/hsr/informal/opinions/1002001.htm>, but seek guidance on application of same to the facts stated above.

Best regards, [REDACTED]

[REDACTED]

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[REDACTED], which operates in England and Wales.

1. Agree that the Bank's acquisition in foreclosure would be exempt under 802.63
2. Agree that in Option 2, 802.63 would not exempt C's acquisition
3. In Option 1, C's acquisition from the Bank can be exempted under 802.1(d)(1) because Bank is not being liquidated and the Railcar Assets do not constitute an operating unit (contrast with #4 below, where the direct acquisition by C from A is not an ordinary course transaction)
4. In Option 2, C's acquisition from A cannot be exempted under 7A(c)(1) or 802.1 because A is being liquidated (see the opinion you referenced – 1002001)

BM  
10/12/11

K. WALSH CONCURS